

STATE OF MICHIGAN
COURT OF APPEALS

BETTIE HUGHES, Personal Representative of the
Estate of THOMAS HUGHES, Deceased,

UNPUBLISHED
April 11, 2006

Plaintiff-Appellant,

v

MAHESHKUMAR PATEL and M. A. PATEL,
M.D., P.C.,

No. 259174
Wayne Circuit Court
LC No. 03-336255-NH

Defendants-Appellees.

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition in this medical malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent treated with defendants on April 26, 1999, at which time Dr. Patel ordered an abdominal CT scan. Plaintiff's decedent suffered an adverse reaction to the dye administered as part of the procedure and eventually died. Plaintiff filed suit in October 2003. The trial court ruled that the claim was barred by the statute of limitations and that plaintiff had failed to plead facts showing fraudulent concealment of the claim. It tacitly denied plaintiff's request for leave to amend her complaint to allege such a claim.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The trial court's ruling on a motion to amend pleadings is reviewed for an abuse of discretion. *Doyle v Hutzler Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). When a trial court fails to specify its reasons for denying a motion for leave to amend, this Court is required to reverse the trial court's decision unless amendment would be futile. *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990).

There is no dispute that plaintiff's claim was not filed within the two-year limitations period, MCL 600.5805(6); MCL 600.5838a(2), even taking into account the tolling for the notice period under MCL 600.5856(c). However, the claim is not barred if the defendant fraudulently conceals the existence of the claim from the knowledge of the person entitled to sue on the claim,

in which case the plaintiff has two years from the time the claim is discovered or should have been discovered. MCL 600.5838a(2)(a) and (3); MCL 600.5855.

A plaintiff who relies on § 5855 “must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment.” *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). Plaintiff did not allege any acts or misrepresentations constituting fraudulent concealment of the claim in her complaint. Nevertheless, she was entitled to leave to amend unless the proposed amendment would be futile. MCR 2.116(I)(5). Therefore, the question is whether the facts justify a basis for invoking the fraudulent concealment exception such that plaintiff should have been granted leave to amend.

Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent. [T]he fraud must be manifested by an affirmative act or misrepresentation. Thus, [t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. [T]here must be concealment by the defendant of the existence of a claim or the identity of a potential defendant If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know [*Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642-643; 692 NW2d 398 (2004) (internal quotation marks and citations omitted).]

The crux of plaintiff’s claim is that Dr. Patel was negligent in ordering an abdominal CT scan when the decedent did not have any complaints that would justify such a procedure. The facts, when taken in a light most favorable to plaintiff, show that plaintiff received the decedent’s medical records from defendants in March 2001. They showed that the decedent complained of back and leg pain but abdominal pain was not expressly mentioned. In September 2003, plaintiff obtained what appeared to be altered records which showed that the decedent had complained of severe abdominal pain. If the records were altered, they showed that defendants tried to cover up the alleged malpractice by providing a basis for a procedure that did not appear to be justified on the basis of the original records alone. However, that did not amount to fraudulent concealment of the existence of the claim, because plaintiff already knew, or should have known, by virtue of the previously provided, presumably unaltered records, that the decedent had not complained of abdominal pain and thus there was no reason for ordering the abdominal CT scan. In fact, over two and one-half years earlier, plaintiff served defendants with a Notice of Intent that alleged malpractice; therefore, the complained-of predicate to the violation of the standard of care was not concealed. Because the allegedly altered records tried to conceal information already known to plaintiff and that information provided the basis for the cause of action against defendants, there can be no fraudulent concealment of a cause of action. Therefore, the proposed amendment would have been futile.

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio